Supreme Court, U.S.
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NO. 99-940

IN THE
SUPREME COURT OF THE UNITED STATES
DECEMBER TERM, 1999

DENISE DEBOSE and JAMES MCCULLOUGH,

Petitioners

UNITED STATES OF AMERICA,

Intervenor

vs.

STATE OF NEBRASKA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DENISE DEBOSE,	)4:95CV3443
Plaintiff,	)
VS.	)
THE STATE OF NEBRASKA	)**MEMORANDUM**
	)**AND ORDER**
Defendant.	)
JAMES MCCULLOUGH,	) 4:95CV3444
Plaintiff,	)
VS.	)
THE STATE OF NEBRASKA	)**MEMORANDUM**
	)**AND ORDER**
Defendant.	)

This matter is before the court on Plaintiffs' application for attorney fees (filing 83 in 4:95CV3443)[1] and costs in support of which Plaintiffs have filed affidavits (filings 84-86); an itemized record of legal services provided

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[1]Because all filings related to Plaintiffs' application for attorney fees and Defendant's responses thereto are identical in both of the above-captioned cases, I shall refer to those documents and their filing numbers only in case number 4:95CV3443.

and costs incurred related to this litigation (filing 83); and a January 8, 1997, memorandum and order authored by United States Senior District Judge Urbom awarding attorney fees to Plaintiffs' counsel in the above-captioned cases at a rate of $175 per hour in an employment case also involving the Nebraska Equal Opportunity Commission (filing 92). In opposition to Plaintiffs' application, Defendant State of Nebraska has filed two affidavits (filing 87).

After consideration of Plaintiffs' application and supporting evidence and Defendant's response thereto, I shall award Plaintiffs $20,201.75 in attorney fees and $1,347.24 in costs.

I.

Plaintiffs Debose and McCullough brought the above-captioned lawsuits against Defendants Lawrence Myers and the State of Nebraska pursuant to the Americans With Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213, and 42 U.S.C. § 1983.

Pursuant to a stipulation between the parties, Defendant Myers was dismissed from McCullough's case on May 19, 1997 (filing 44 in 4:95CV3444). Debose's ADA claim against Defendant Myers in his individual capacity was dismissed on July 2, 1997, pursuant to Myers' summary judgment motion (filing 60), and Myers was dismissed from the remainder[2] of Debose's case on July 7, 1997 (the morning of the first day of trial), pursuant to the parties'

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[2]Only Debose's 42 U.S.C. § 1983 claim against Myers remained at the time of his dismissal from Debose's case. (See Filing 60 at 3.)

stipulation (filing 66). Because Plaintiffs' § 1983 claims were only against Defendant Myers and because Myers was dismissed from both cases prior to trial, Plaintiffs' ADA claims against the State of Nebraska were the only claims remaining for trial.

The court held a three-day jury trial in July 1997 on Plaintiffs' remaining claims. Plaintiffs prevailed on their ADA claims against the State of Nebraska, with Plaintiff Debose receiving $30,743.20 in back pay, $46,000.00 in compensatory damages, and reinstatement, and Plaintiff McCullough receiving $54,671.70 in back pay, $46,000.00 in compensatory damages, and $95,790.00 in front pay. (Filings 77 & 82.)

II.

Plaintiffs seek $22,998.25 in attorney fees for a total of 197.50 hours of service rendered, and further request costs in the amount of $1,422.24 to cover filing fees and costs incurred for copies of a transcript and depositions.

This court has discretion to allow the "prevailing party" in these ADA lawsuits a reasonable attorney fee, including litigation expenses and costs. 42 U.S.C. § 12205. Defendant State of Nebraska does not dispute that Plaintiffs were the prevailing parties for purposes of an attorney fee award.

Pursuant to 42 U.S.C. § 12117(a), the standard for granting an award of attorney fees under the ADA is the same as that under Title VII, Benson v. Northwest Airlines, Inc., 1997 WL 122897, *4 n.4 (D.Minn. 1997), and 42 U.S.C. § 1988, Hensley v. Eckerhart, 461 U.S. 424, 433 n.7 (1983) ("The standards set forth in this opinion are

generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party'").

In what has come to be known as the "lodestar", a reasonable attorney fee is the number of hours reasonably expended on the lawsuit, multiplied by a reasonable hourly rate. Hensley v. Eckerhart, 461 U.S. at 433. Courts are to look to the marketplace as a guide in determining what is a "reasonable" attorney fee. Missouri v. Jenkins, 491 U.S. 274, 285 (1989); Blum v. Stenson, 465 U.S. 886, 895 n.11 (1984) (reasonableness of requested rates is to be determined with reference to rates prevailing in the community for similar services by attorneys of comparable skill, experience, and reputation).

Subsumed within the lodestar calculation are the "Johnson factors", derived from Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974). Hensley v. Eckerhart, 461 U.S. at 429-30 & 434 n.9 (referring to Johnson factors, and noting that "many of these

factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate").[3]

I now turn to calculation of the lodestar, specifically taking into account the Johnson factors.

A.
Time and Labor Required

Plaintiffs seek $22,998.25 in attorney fees for a total of 197.50 hours of service rendered, as specified below:

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[3]Hensley makes clear that [the Johnson factors] matter only as they bear on the market rate or hours reasonably expended, or in rare cases, if they are a basis for adjusting the lodestar. Alan Hirsch & Diane Sheehey, Awarding Attorneys' Fees and Managing Fee Litigation at 19 n.84 (Federal Judicial Center 1994). In reaching my decision, I have considered each and every Johnson factor. These factors are: (1) time and labor required; (2) novelty and difficulty of issues; (3) skill required; (4) loss of other employment; (5) customary fee; (6) whether fee is fixed or contingent; (7) time limitations imposed by client or circumstances; (8) amount involved and results obtained; (9) counsel's experience, reputation, and ability; (10) undesirability of case; (11) nature and length of relationship with clients; and (12) awards in similar cases. Johnson v. Georgia Highway Express, Inc., 488 F.2d at 717-19.

Timekeeper	Hours	Rate	Total
Thom K. Cope	115.15	$175.00	$20,151.25
Law Clerk	16.90	10.00	169.00
Law Clerk	64.45	40.00	2,578.00
Anthony C. Coe	1.00	100.00	100.00

Defendant does not contend that 197.50 hours is unreasonable, and I am satisfied that this amount of time is reasonable for two separate cases, consolidated for trial, that required taking depositions of eight individuals; the preparation of responses to motions for summary judgment; and the presentation of eight witnesses and numerous exhibits at a three-day jury trial.

Novelty and Difficulty of Questions

This case did not present any particularly novel or difficult questions.

Skill Required

The skill required of counsel in these cases was that of an experienced trial lawyer with a specialized background in employment law issues. Plaintiffs' counsel demonstrated such skill and experience.

Preclusion of Other Employment

Aside from the hours expended, these cases did not otherwise preclude counsel from taking other employment.

Customary Fee

Plaintiffs claim that $175 per hour for counsel's services represents a reasonable and customary fee for similar work in the community, and Plaintiffs have submitted affidavits from two highly respected labor and employment lawyers which indicate that $175 per hour is reasonable and customary for labor law litigation where counsel has significant experience and expertise in the area of labor law. (Filing 84, Aff. Carole McMahon-Boies; Filing 86, Aff. Thomas F. Dowd.) Plaintiffs have also filed a January 8, 1997, memorandum and order authored by United States Senior District Judge Urbom awarding attorney fees to Plaintiffs' counsel in these cases at a rate of $175 per hour in an employment case also involving the Nebraska Equal Opportunity Commission (filing 92).

Defendant disputes that $175 is reasonable and customary and has submitted affidavits of two other well-respected attorneys, one who states that $145 per hour would be reasonable and customary for attorneys practicing in this geographical area with the skill and experience of Plaintiffs' counsel, and another who states that lawyers in and around Lincoln with levels of skill and experience similar to Plaintiffs' counsel customarily charge from $115 to $150 per hour. (Filing 87, Ex. 1, Aff. Robert B. Evnen; Filing 87, Ex.2, Aff. Randall L. Goyette.)

> Establishing an appropriate hourly rate is not easy. Depending on the experience of the individual attorneys involved, commercial litigation in this court normally generates fees ranging from $90 to $150 per hour. Lutheran Medical Ctr. v. Contractors, Laborers, Teamsters & Engineers

Health & Welfare Plan, 814 F. Supp. 799, 805 (D. Neb. 1993), aff'd, 25 F.3d 616 (8th Cir. 1994). Prisoner civil-rights cases generate court-approved fees ranging from $85 to $105 per hour. Id. Labor-law cases not infrequently generate awards of $160 to $170 per hour. See, e.g. Meredith v. Gunatit Inc. (D. Neb. 1993) (No. CV90-O-126) (Fair Labor Standards Act); Stokes v. City of Omaha (D. Neb. 1993) (No. CV89-O-664) (Age Discrimination in Employment Act).

Hatley v. Store Kraft Mfg. Co., 859 F. Supp. 1257, 1268 (D. Neb. 1994).

In light of the above-captioned language from the 1994 Hatley decision indicating that labor law cases generate attorney fee awards of up to $170 per hour; the affidavits of two highly respected labor and employment lawyers who state that $175 per hour is a reasonable and customary attorney fee in this geographical region for the services of an employment lawyer with skills and experience similar to that of Plaintiffs' counsel; and the January 8, 1997, memorandum and order by Judge Urbom awarding attorney fees to Plaintiffs' counsel in these cases at a rate of $175 per hour in an employment case also involving the Nebraska Equal Opportunity Commission, I conclude that $175 per hour is reasonable and customary for similar work in the community, especially when charges for postage, telephone and fax use, and photocopying were built into this hourly rate. (Filing 85, Aff. Thom K. Cope).

Defendant has not objected to the law clerk hourly rate of $40.00 for legal research and drafting tasks and $10.00 per hour for copying and delivering documents.

Fixed or Contingent Fee

Plaintiffs have not submitted any information from which I am able to determine whether the fee arrangement in these cases was fixed or contingent.

Time Limitations Imposed by the Client or the Circumstances of the Case

I am aware of no particular time limitations or unusual circumstances imposed upon Plaintiffs' counsel in these cases.

Amount Involved and Results Obtained

Plaintiffs prevailed on all of their claims against the State of Nebraska, with Plaintiff Debose receiving $30,743.20 in back pay, $46,000.00 in compensatory damages, and reinstatement, and Plaintiff McCullough receiving $54,671.70 in back pay, $46,000.00 in compensatory damages, and $95,790.00 in front pay. (Filings 77 & 82.) This is an excellent result and is a fair reflection of the amount actually involved in these cases. Indeed, the jury awarded Plaintiffs what they requested.

Experience, Reputation, and Ability of Attorney

Plaintiffs' counsel has been practicing employment law since 1973; has attained the highest bar rating in Martindale & Hubbell; has participated in numerous employment cases in the Nebraska Supreme Court, the United States District Court for the District of Nebraska, and the Eighth Circuit Court of Appeals; has authored a book on employment practices and lectures extensively

throughout the United States on employment law; and has been selected for admission as a fellow in the College of Labor and Employment Lawyers, Inc.

Plaintiffs' counsel is an experienced attorney in the area of employment law with a good reputation and above-average ability.

Undesirability of Case

There was nothing particularly undesirable about this case that would cause counsel to suffer a hardship in the community.

Nature and Length of Relationship with Client

Plaintiffs have submitted no information regarding the nature or length of relationship of Plaintiffs' counsel with his clients in this case.

Awards in Similar Cases

As stated above, Plaintiffs have submitted a January 8, 1997 memorandum and order by United States Senior District Judge Urbom awarding attorney fees to Plaintiffs' counsel in these cases at a rate of $175 per hour in an employment case also involving the Nebraska Equal Opportunity Commission (filing 92). Shepherd v. Stennis, No. 4:CV95-3063, slip op. at 4 (D. Neb. Jan. 8, 1997).

B.

Besides objecting to Plaintiffs' counsel's hourly rate of $175 discussed above, Defendant State of Nebraska

objects to (1) the inclusion of one hour of legal services provided by attorney Anthony Coe when Plaintiffs have failed to provide any affidavits or other information regarding Mr. Coe's experience, reputation, and ability; (2) Plaintiffs' failure to comply with NELR 54.4(a) (1) and (3) by not stating what wage rate the law clerk was paid by counsel's law firm and not specifically indicating the subject of certain legal research and whether it was incorporated into a brief, motion, or pleading; and (3) the inclusion of legal services related to Plaintiffs' claims against Defendant Myers, as Defendant Myers was not involved in the trial of this matter, having been dismissed by the parties prior to that time.

I agree with Defendant's first objection because without any information whatsoever regarding Mr. Coe's experience, reputation, ability, and customary billing rates, I am unable to determine a reasonable hourly rate for the one hour billed by him. Accordingly, I shall subtract the one hour of time billed at $100.00 per hour by Attorney Anthony Coe from the final fee award.

Defendant's second objection is that, while not objecting to the $40-per-hour rate charged for a law clerk's legal research and drafting tasks and the $10 hourly rate for copying or delivering documents, Plaintiffs have failed to state "the salary or other wage rate at which the law student was paid by the attorney or law firm, as required by the fee application guidelines contained in NELR 54.4(a) (3). Because Defendant does not object to the rates billed for these law clerk tasks, and because Defendant has not discussed how failure to include the law clerk's salary or wage should or would affect the fee award, I shall make no adjustments to the fee award based on this argument.

Defendant also objects to Plaintiffs' failure to properly document the subjects or issues researched and whether the research was incorporated into a brief, motion, or pleading pursuant to NELR 54.4(a) (1) in the following entries:

4/22/97	LC	Legal research re: depression; Review; of cases relating to depression;	2.00
4/24/97	LC	Legal research; find brochures on depression;	1.20
5/13/97	LC	Legal research at law library;	1.40

I agree with this objection, as I am unable to determine how such research was used, if at all, for purposes of these cases. Accordingly, I shall deduct 4.6 hours of law clerk time, billed at $40 per hour, from the final fee award.

The State of Nebraska's third objection is that the inclusion of legal services related to Plaintiffs' claims against Defendant Myers is unwarranted as against the State of Nebraska because Defendant Myers was not involved in the trial of this matter, having been voluntarily dismissed by the parties prior to trial.

As noted above, Defendant Myers was dismissed from McCullough's case on May 19, 1997, pursuant to a stipulation between the parties, (filing 44 in 4:95CV 3444). Debose's ADA claim against Defendant Myers in his individual capacity was dismissed on July 2, 1997, pursuant to Myers' summary judgment motion (filing 60), and Myers

was dismissed from the remainder[4] of Debose's case on July 7, 1997, pursuant to the parties' stipulation (filing 66). Thus, Plaintiffs did not prevail against Defendant Myers. Trader v. Fiat Distributors, 30 Fair Empl. Prac. Cas. (BNA) 1573, 1575 n.1 (D. Del. 1982) (number of hours spent on case was inflated because total included time spent litigating against a defendant against whom plaintiff did not prevail because that defendant was dismissed with prejudice pursuant to stipulation).

Therefore, I agree with Defendant that 3.4 hours of time expended on April 30, May 1, May 30, and June 5, 1997, for tasks related solely to the Plaintiffs' claim against Myers should be deducted from the final fee award when it is not clear whether this time was spent on Plaintiffs' ADA or First Amendment claim against Myers.[5] Of this amount, 1.4 hours was counsel's time at $175 per hour, and 2.0 hours was a law clerk's research time at $40.00 per hour.

Further, the hours of time expended on tasks which involved the plaintiffs' claims against the State of Nebraska

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[4]Only Debose's 42 U.S.C. § 1983 claim against Myers remained at the time of his dismissal from Debose's case. (See filing 60 at 3).

[5]See infra note 6.

and Myers should be reduced by one-third[6] to account for time spent on Plaintiffs' First Amendment claim against Myers. Trader, 30 Fair Empl. Prac. Cas. (BNA) at 1575 (amount of time attributed to claim against one defendant who was dismissed with prejudice pursuant to stipulation deducted from time claimed in attorney fee application). I shall make this one-third reduction to the following billing entries[7] to which Defendant State of Nebraska specifically objects:

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[6]I have arrived at the one-third deduction as follows. Plaintiffs' first cause of action concerned the ADA and was brought against the State of Nebraska; Plaintiffs' second cause of action was an ADA claim against both the State of Nebraska and Myers; and Plaintiffs' third cause of action was a First Amendment claim pursuant to 42 U.S.C. § 1983 against Defendant Myers. Because time spent on Plaintiffs' two ADA claims involved a "common core of facts," Hensley, 461 U.S. at 435, I shall not attempt to deduct time for counsel's work on Plaintiffs' ADA claim against Myers. However, I shall deduct for time spent on the third cause of action against Myers, which would constitute one-third of the claims in these lawsuits.

[7]"LC" denotes Law Clerk and "TKC" denotes Plaintiffs' counsel. Based on the description of the nature of work performed listed on the itemization attached to Plaintiffs' application for attorney fees, I have determined what the hourly rate charged to those tasks was.

Date	Timekeeper	Rate	Hours	Total
5/20/97	LC	$40.00	2.40	$ 96.00
5/21/97	LC	$40.00	6.50	$ 260.00
5/23/97	LC	$40.00	5.80	$ 232.00
5/27/97	LC	$40.00	6.40	$ 256.00
6/9/97	TKC	$175.00	13.50	$2,362.50
6/9/97	LC	$10.00	1.90	$ 19.00
6/11/97	LC	$10.00	.60	$ 6.00
6/18/97	TKC	$175.00	1.50	$ 262.50
6/24/97	TKC	$175.00	1.00	$ 175.00
6/30/97	LC	$10.00	.60	$ 6.00
7/1/97	TKC	$175.00	4.50	$ 787.50
7/6/97	TKC	$175.00	12.00	$2,100.00
				$6,562 50

One-third of $6,562.50 is $2,187.50. Accordingly, I shall deduct $2,187.50 from the final fee award.

Finally, Defendant State of Nebraska objects to paying the full price of Myers' deposition, $150.00. I shall reduce that amount by one-half, or $75.00, as one claim against Myers was based on the ADA and the other on the First Amendment.

C.

In summary, after considering and balancing each Johnson factor and taking into account each of Defendant's objections, I shall grant Plaintiffs' application with the following adjustments:

Amount Requested for Services:		$22,998.25
Less one hour billed by attorney Anthony Coe at $100.00 per hour	-	$ 100.00

Less 4.6 hours of law clerk time billed at $40.00 per hour	-	$ 184.00
Less 1.4 hours of counsel's time billed at $175.00 per hour	-	$ 245.00
Less 2.0 hours of law clerk time billed at $40.00 per hour	-	$ 80.00
Less one-third reduction to tasks related to both State of Nebraska and Myers	-	$ 2,187.50
Total		**$20,201.75**
Amount Requested for Costs:		$ 1,422.24
Less one-half deposition cost for First Amendment claim against Myers	-	$ 75.00
Total		**$ 1,347.24**

Therefore, I shall award Plaintiffs $20,201.75 in attorney fees and $1,347.24 in costs.

IT IS ORDERED:

1. Plaintiffs' motion (filing 83) requesting an award of attorney fees and costs is granted in part and denied in part, and the plaintiffs are awarded $20,201.75 in attorney fees and $1,347.24 in costs; and

2. Final judgment shall be entered by separate document contemporaneously with the filing of this memorandum and order.

DATED this 27th day of August, 1997.

BY THE COURT:

"s/____"
Richard G. Kopf
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DENISE DEBOSE,	)	4:95CV3443
	)	
Plaintiff,	)	
VS.	)	
	)	
THE STATE OF NEBRASKA,	)	**JUDGMENT**
	)	
Defendant.	)	
	)	
JAMES MCCULLOUGH,	)	4:95CV3444
	)	
Plaintiff,	)	
	)	
VS.	)	
	)	
THE STATE OF NEBRASKA,	)	**JUDGMENT**
	)	
Defendant.	)	

Pursuant to the court's Memoranda and Orders previously filed in this matter, final judgment is entered in favor of Plaintiffs and against Defendant on the jury verdict rendered July 9, 1997. Specifically, judgment is entered for Plaintiffs and against Defendant on the jury verdict as follows:

(1) As to Plaintiff Denise Debose on the Americans with Disabilities Act claim, Plaintiff shall recover $30,743.20 in back wages and benefits and $46,000.00 in compensatory damages;

(2) As to Plaintiff James McCullough on the Americans with Disabilities Act claim, Plaintiff shall recover $54,671.70 in back wages and benefits and $46,000.00 in compensatory damages.

Pursuant to the previous memorandum and order following a hearing on the issue of front pay and reinstatement (filing 82), the State of Nebraska shall immediately reinstate Plaintiff Debose effective March 16, 1995, under the following terms and conditions:

(1) Plaintiff will be immediately entitled to all fringe benefits if she makes her portion of the required contribution and Plaintiff shall not be charged with a break-in-service;

(2) Plaintiff's salary shall not start until September 1, 1997, and she shall report to work on September 2, 1997;

(3) Defendant shall reinstate Plaintiff so that the Plaintiff enjoys essentially the same job, at essentially the same place, and with essentially the same working conditions as she would have enjoyed on the day before she was terminated;

(4) Defendant shall not retaliate against Plaintiff and shall make all reasonable efforts to insure that no employee of the Defendant retaliates against Plaintiff;

(5) As far as case goals and timetables and discipline are concerned, Plaintiff shall have a fresh start;

(6) The Court retains jurisdiction to enforce this order and to make necessary amendments.

Pursuant to the previous memorandum and order following a hearing on the issue of front pay and reinstatement (filing 82), Plaintiff McCullough is awarded front pay instead of reinstatement in the sum of $95,790.00.

Plaintiffs are also awarded $20,201.75 in attorney fees and $1,347.24 in costs.

DATED this 27th day of August, 1997.

BY THE COURT:

"s/____"
Richard G. Kopf
United States District Judge